SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 113

ROY WEBBER TINDER, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONER ROY WEBBER TINDER, JR.

WILLIAM W. KOONTZ,
Alexandria, Virginia,
Counsel for Petitioner.

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Opinions Below

The opinion of the Court of Appeals (R. 20-26) is reported at 193 F. 2d 720. The memorandum opinion of the District Court (R. 14-16) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 28, 1951 (R. 26). The petition for writ of certiorari was filed January 16, 1952, and granted June 9, 1952. The jurisdiction of this Court rests upon 28 U. S. C. §1254 (1).

Question Presented

Whether, under 18 U. S. C. §1708, the penalty for theft of the mail can be imprisonment for longer than a year if the matter stolen does not have a value or face value in excess of $100.00.

Statute Involved

18 U. S. C. § 1708

"§ 1708. THEFT OR RECEIPT OF STOLEN MAIL MATTER GENERALLY.

Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

"Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

"Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

"Shall be fined not more than $2,000 or imprisoned not more than five years, or both; but if the value or face value

of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. June 25, 1948, c. 645, 62 Stat. 779, amended May 24, 1949, c. 139, § 39, 63 Stat. 95.'"[1]

Statement

Petitioner, Roy Webber Tinder, Jr., represented by counsel, pleaded guilty in the United States District Court for the Eastern District of Virginia on September 13, 1950, to a whole indictment consisting of six counts, each of which charged a separate violation of 18 U. S. C. §1708 (R. 3). The offenses charged were six thefts of letters from the mail boxes of six different addresses during the period of March 1, 1950, to May 3, 1950 (R. 1-2).

No count of the indictment alleges, and it does not appear elsewhere in the record, that the value of any letter exceeded $100.00. The trial court sentenced petitioner to serve three years on each count, the sentences to run concurrently (R. 3-4).

After he had served approximately one year of his sentence petitioner in August, 1951, filed a motion in the United States District Court for the Eastern District of Virginia under 28 U. S. C., § 2255 to vacate or correct his sentence (R. 11-13). The ground for this motion was that since none of the matter stolen from the mail boxes was of a value of more than $100.00, the maximum imprisonment which could

[1] Following the decision of the Ninth Circuit in *Armstrong* v. *United States*, 187 F. 2d 954, (printed as the Appendix to this brief at pp. 13-16) Congress at the urging of the Postmaster General and the Attorney General deleted the mis-demeanor clause of this statute. P. L. 432, 82d Cong., 2d Sess., approved July 1, 1952, provided: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the fourth paragraph of section 1708, title 18, United States Code, is hereby amended by changing the semicolon to a period and by striking out the clause reading 'but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.'" 66 Stat. 314.

have been imposed was one year on each count; and since the imprisonment on all counts was to run concurrently, the maximum total time for which he could be imprisoned was one year. The District Court denied petitioner's motion in a memorandum opinion on October 4, 1951 (R. 14-16), and the Court of Appeals for the Fourth Circuit affirmed this action on December 28, 1951, in an opinion written by Judge Chesnut (R. 20-26). Because of a conflict between this opinion and that of the Ninth Circuit in *Armstrong* v. *United States*, 187 F. 2d 954, this Court granted a writ of certiorari (R. 27).

Specification of Error to Be Urged

The Court of Appeals erred in holding that the statute did not contemplate a division of the crime of theft of mail into felonies and misdemeanors depending upon the value of the object stolen.

Summary of Argument

18 U. S. C. § 1708 does not distinguish between the crime of theft of the mail and the crime of theft of an article or thing from a piece of mail, and the punishment imposed for both crimes depends solely on the value of the matter stolen.

Argument

It is a cardinal principle of judicial interpretation that penal statutes are to be strictly construed, and that penalties are not to be extended or increased by implication. Doubt and ambiguity are to be resolved in favor of the accused. *United States* v. *Resnick*, 299 U. S. 207, 57 Sup. Ct. 126, 81 L. Ed. 127; *Pierce* v. *United States*, 314 U. S. 306, 62 Sup. Ct. 237, 86 L. Ed. 226; *United States* v. *Cardiff*, — U. S. —, 97 L. Ed. Adv. Ops. 132.

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction

itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment." Chief Justice Marshall in *The United States* v. *Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37.

And in the words of the present Court as expressed by Mr. Justice Frankfurter in *United States* v. *Universal C. I. T. Credit Corp.*, — U. S. —, 97 L. Ed. Adv. Ops. 186, 189:

"Not that penal statutes are not subject to the basic consideration that legislation like all other writings should be given, insofar as the language permits, a commonsensical meaning. But when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication."

The statute under consideration very clearly provides that whoever steals from any mail receptacle any letter, postal card, package, bag or mail, or removes from any such letter, package, bag, or mail, any article or thing contained therein shall be fined not more than $2000 or imprisoned not more than five years, or both: "but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1000 or imprisoned not more than one year, or both." In other words if the stolen letter or package does not contain matter of a value in excess of $100 the wrongdoer cannot be punished by imprisonment of more than one year. The statute first makes it an offense to steal from the mail, and then fixes the punishment for the offense upon the value of the item stolen. This is the manifest intent of the statute and effect should be given to the plain meaning of its words. *Browder* v. *United States*, 312 U. S.

335, 61 Sup. Ct. 599; 85 L. Ed. 862; *United States* v. *American Trucking Association*, 310 U. S. 534, 60 Sup. Ct. 1059; 84 L. Ed. 1345.

The Court of Appeals, however, spelled out a subtle and technical distinction between stealing a piece of mail, namely a letter, postal card, package, bag, and stealing from such piece of mail any article or thing. In its opinion the greater penalty is imposed for stealing an item of mail, and the lesser penalty is invoked only when something tangible is unlawfully removed from the item of mail without the theft or destruction of the item itself.

Such a construction is strained and synthetic. According to it, to steal from the mail a letter consisting of an envelope and the writing contained therein is a far greater offense than to remove the contents of an envelope and leave the empty envelope in the mail.

There is nothing to suggest that by enacting this section as part of the revised Criminal Code in 1948 Congress intended that the penalty be determined by the type of offense rather than the value of the purloined mail. The proviso under consideration, "but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1000 or imprisoned not more than one year, or both" was added by the reviser of the Criminal Code of 1948, whose comment was: "The smaller penalty for an offense involving $100 or less was added. (See sections 641 and 645 of this title)". As the Court of Appeals for the Ninth Circuit very aptly pointed out in *Armstrong* v. *United States*: "This notation, which accompanied the proposed revision submitted to Congress for approval, does not suggest that the penalty was to be reduced only for certain types of offenses. The general language of the notation, together with the reference to a comparably ambiguous provision of Sec. 641, indicates application of the proviso to all prohibitory sections of the statute.". 187 F. 2d at 956.

Sec. 641 of the Criminal Code provides that whoever steals or embezzles "any record, voucher, money, or thing of value of the United States . . . or any property made or being made under contract for the United States . . . shall be fined not more than $10,000 or imprisoned not more than ten years or both, but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1000 or imprisoned not more than one year, or both." This section is worded very similarly to Sec. 1708 except that the word "property" is used rather than "article or thing." As to this section the reviser says:

> "The provisions for fine of not more than $1,000 or imprisonment of not more than 1 year for an offense involving $100 or less and for fine of not more than $10,000 or imprisonment of not more than 10 years, or both, for an offense involving a greater amount were written into this section as more in conformity with the later congressional policy expressed in sections 82 and 87 of Title 18, U. S. C., 1940 ed., than the nongraduated penalties of sections 100 and 101 of said Title 18."

Likewise Sec. 645, which establishes the punishment for embezzlement by court officials, contains a similar proviso: "but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both." And here again the reviser says: "The smaller punishment for an offense involving $100 or less was inserted to conform to section 641 of this title which represents a later expression of congressional intent."

It is obvious that all these statutes were designed to fix a uniform standard for a division of the crimes into misdemeanors or felonies. 18 U. S. C. §1. The punishment is scaled according to the pecuniary amount or value involved in the particular offense. The statutes evince no intention to classify the punishment of the enumerated crimes on any other basis than value.

Such a classification for the purpose of punishment is in accord with the declared policy of the reviser, which was approved and adopted by Congress:

"CHANGES IN PUNISHMENT"

"Many inconsistencies in punishments were discovered. Some appeared too lenient and others too harsh when compared with crimes of similar gravity. The problem was twofold.

"First, it was found that in spite of an exact definition of felonies and misdemeanors, 29 punishments were inaccurately labeled, resulting in conflicting court opinions. This problem was solved by omitting from each of the 29 punishments any description of the offense as a felony or misdemeanor, leaving the test as to the kind of crime, to the definitive section.

"Second, serious disparities in punishments were discovered when the nature of various crimes was considered. Before attempting to eliminate these differences a master table showing the nature of each offense and its punishment was prepared. In this way many inequalities were eliminated and uniformity brought out of the conflicts which time had developed." HR Rep. No. 304, 80th Cong., 1st Sess.: 18 U. S. C. A. App. 588.

To the same effect is the statement of William W. Barron, Chief Reviser. 18 U. S. C. A. App. 597.

The statute under consideration at no place says or implies that theft of something from a piece of mail is a less serious offense than theft of the piece of mail.

"It would have been a simple matter for the reviser, or Congress, to have made clear, had such been the intent, that stealing 'an article or thing' from an item of mail, leaving the item of mail otherwise intact, is to be regarded as a less serious offense than stealing the item of mail itself. A highly technical distinction of this sort, which could easily have been spelled out, cannot be imposed on the general words 'any such

> article or thing' in the concluding proviso of Sec. 1708. Those words must be deemed to include any article or thing previously mentioned in Sec. 1708, whether it is described specifically as a 'letter' or generally as 'an article or thing.'" *Armstrong* v. *United States*, 187 F. 2d 954, 956.

Congress drew no fine distinction between these two types of theft, and such an artificial distinction should not be attempted by the courts. "It is safer to adopt what the legislature have actually said than to suppose what they meant to say." *Jones* v. *Smart*, 1 T. R. 51, quoted in *United States* v. *Chase*, 135 U. S. 255, 10 Sup. Ct. 756, 34 L. Ed. 117.

When it learned that the sanctity and integrity of the mail might be impaired by Sec. 1708, Congress acted promptly to protect the mail, and it did not follow the strained technicalities spelled out by the Court of Appeals. It simply deleted from the section the proviso as to the value of the matter stolen and made all thefts of the mail or from the mail and receipt of stolen mail punishable by a fine of not more than $2,000 or imprisonment of not more than five years, or both. Amendment to 18 U.S.C. § 1708 of July 1, 1952; 66 Stat. 314. Every type of mail theft was thereby considered to be a felony regardless of the amount involved. There was no suggestion whatever on the part of Congress that stealing the contents of a piece of mail was a less serious offense than stealing the piece of mail itself.

Recently the Court has redeclared that "we may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and the clause and the statute that expresses the purpose of Congress. Very early Chief Justice Marshall told us, 'Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived . . . *United States* v. *Fisher* (U. S.) 2 Cranch 358, 386, 2 L. Ed. 304, 314.'" *United States* 5,

Universal C. I. T. Credit Corp., — U. S. — 97 L. Ed. Adv. 186, 189.

Certainly the reports of the Congressional committees as to why in 1952 it was considered necessary to delete the proviso of Sec. 1708 very adequately explain what Congress had in mind when it originally added this proviso to Sec. 1708 in the Criminal Code of 1948. Sen. Rep. No. 980 and H. R. Rep. No. 1674, 82d Cong., 2d Sess., deal with the proposed amendment to 18 U. S. C. §1708. The Senate Report, repeated in substance by the House report, states in part as follows:

"PURPOSE"

"The purpose of this bill, which relates to the penalty for the theft and receipt of mail matter, is to make all such thefts felonies, regardless of the monetary value of the thing stolen. Under the Federal Criminal Code, any crime which carries a penalty of more than 1 year imprisonment, or a fine of more than $1,000 is considered a felony, while any crime carrying a fine or imprisonment smaller than this is considered a misdemeanor."

"STATEMENT"

"The present bill amends the penalty provisions of the fourth paragraph of section 1708, title 18, United States Code, by striking therefrom the italicized words:

"'Shall be fined not more than $2,000 or imprisoned not more than five years, or both; *but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.*'

"The effect of the present law is to make the crime of stealing mail a misdemeanor (fine of not to exceed $1,000 and imprisonment of not to exceed 1 year) if the value of the mail stolen does not exceed $100, and to make it a felony (fine up to $2,000 and imprisonment up to 5 years) if the value of the stolen mail exceeds $100. The effect of striking the italicized language will

be to make the crime a felony (with a uniform permissible penalty of up to $2,000 fine and up to 5 years' imprisonment) regardless of the value of the mail stolen.

"The language proposed to be stricken out was new matter added during the course of the revision and codification of title 18 of the United States Code in 1948. The historical and revision notes at the end of section 1708 of the code annotated for citations reveal that this language was added for the sake of uniformity. Certain other sections of title 18, in such crimes as theft and embezzlement divide the penalty into felonies and misdemeanors, depending upon the 'value' of the thing stolen, and the thought was that the same distinction should be made in the case of stolen mail. The committee now thinks that this was an incorrect view. While there may be valid reason for dividing the penalty in other types of crime, the thing being protected here is more the sanctity and integrity of the United States mails than it is the property value of individual pieces of mail, and this sanctity and integrity is of such importance that all violations warrant the heavier penalty."

Both the House and Senate passed the amendment without debate and it became P. L. 432, 82d Cong., 2d Sess.; 66 Stat. 314. We thus have a plain and clear statement of the intent of Congress at the time it enacted Sec. 1708 of the Criminal Code of 1948. The purpose was to put the crime of stealing mail in the same category as embezzlement and other thefts so that the penalty would depend upon the value of the matter stolen. There is nothing to indicate that Congress intended to draw the highly technical distinction between stealing an item of mail and stealing the contents of the item of mail.

Conclusion

For the foregoing reasons the judgment of the Court of Appeals should be reversed and the case remanded to the District Court with directions to modify the sentence by substituting not over one year in the place of three years on each count.

Respectfully submitted,

WILLIAM W. KOONTZ,
Counsel for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

No. 12739

ARMSTRONG

v.

UNITED STATES

March 23, 1951

As Amended April 26, 1951

Cecil Armstrong, in propria persona, for appellant.

Frank J. Hennessy, U. S. Atty., R. H. Colvin and Macklin Fleming, Asst. U. S. Attys., all of San Francisco, Cal., for appellee.

Before Denman, Chief Judge, and Orr and Hastie, Circuit Judges

ORR, *Circuit Judge:*

In the year 1949 appellant entered a plea of guilty to four counts of an indictment. Each count charged that appellant "did steal, take and abstract from and ouf of an authorized depository for mail matter, to-wit, (a certain) house letter box * * * a (certain) letter * * *." The charges were brought under Sec. 1708, 18 U. S. C. A.

The trial court sentenced appellant to serve five years on the first count and three years on the remaining three counts. The three year terms were to run concurrently and to commence at the expiration of the five year term.

On September 26, 1950 appellant petitioned the trial court to correct the sentences on the ground that the penalty imposed was in excess of that provided by law. The petition was denied. The specific contention of appellant is: That the indictment does not allege, nor does it otherwise appear, that any of the letters alleged to have been taken from the letter boxes was of a value of more than $100, hence, the

maximum penalty which could have been lawfully imposed under each count was not more than a fine of $1,000 or imprisonment for not more than one year or both. Sec. 1708, 18 U. S. C. A., under which the indictment was drawn, reads:

"§ 1708. Theft or receipt of stolen mail matter generally.

"Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

"Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

"Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

"Shall be fined not more than $2,000 or imprisoned not more than five years, or both, but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

It is the contention of the Government that the application of the lesser punishment provided by Sec. 1708 is limited to theft *from* the mail as distinguished from theft *of* the mail, and that the phrase "article or thing", as used in the proviso contained in Sec. 1708, has no application to mail, letters, etc., named in said section. Which is to say that only in the event possession of mail matter is obtained in a manner otherwise than that prohibited by Sec. 1708,

and the contents of such mail unlawfully then removed, can the lesser penalty be imposed.

Prior to the 1948 revision of the Criminal Code, the maximum penalty for violation of any provisions of the then controlling Sec. 317 was five years. In commenting on the proviso added to Sec. 1708 in 1948, the reviser said: "The smaller penalty for an offense involving $100 or less was added." (See sections 641 and 645 of this title.)" This notation, which accompanied the proposed revision submitted to Congress for approval, does not suggest that the penalty was to be reduced only for certain types of offenses. The general language of the notation, together with the reference to a comparably ambiguous provision of Sec. 641, indicates application of the proviso to all prohibitory sections of the statute. The distinction sought to be drawn by the Government is not supported by the statutory language. It would have been a simple matter for the reviser, or Congress, to have made clear, had such been the intent, that stealing "an article or thing" from an item of mail, leaving the item of mail otherwise intact, is to be regarded as a less serious offense than stealing the item of mail itself. A highly technical distinction of this sort, which could easily have been spelled out, cannot be imposed on the general words "any such article or thing" in the concluding proviso of Sec. 1708. Those words must be deemed to include any article or thing previously mentioned in Sec. 1708, whether it is described specifically as a "letter" or generally as "an article or thing."

Argument is made that federal statutes for generations have made theft of mail a serious felony and that the Government's preservation of the integrity of mail has been a cornerstone in the development of our national system of communication and because of the seriousness with which Congress has viewed mail theft and tampering in the past it is hardly reasonable to say that it intended to alter that attitude in the enactment of Sec. 1708. Such an argument, we think, loses its force in the face of an expressed intention to make a change by dividing the crime into felonies and misdemeanors with value as the determining factor.

We note the Government's argument that in a great majority of cases of mail theft it would be impossible to

allege or prove the value of a particular letter or other item stolen and thus result in misdemeanor prosecutions rather than felonies. This is a matter for the attention of Congress rather than the courts.

The order denying appellant's petition for correction of sentence is reversed and the cause remanded to the District Court with directions to modify the sentence heretofore imposed on defendant by substituting not over one year in the place of five years on the first count, and not over one year in the place of three years on each of the remaining counts.

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